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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 904

ARROW PACKING CORPORATION AND GEORGE NEWMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 226–229) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered January 29, 1946 (R. 229). The petition for a writ of certiorari was filed March 1, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Petitioners do not deny that sales at prices in excess of O. P. A. ceiling prices were made by an employee of petitioner Arrow Packing Corporation. The principal question presented is whether the evidence is sufficient to establish the responsibility of petitioners for these acts of the employee.

STATUTE INVOLVED

The Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 58 Stat. 632 (50 U. S. C. App., Supp. IV, 901 et seq.), provides in pertinent part:

> SEC. 2. (a) Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and effectuate the purposes of this Act.
>
> SEC. 4. (a) It shall be unlawful * * * for any person to sell or deliver any commodity, * * * in violation of any regulation or order under section 2 * * *.
>
> SEC. 205. (b) Any person who willfully violates any provision of section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not

more than two years in the case of a violation of section 4 (c) [relating to the disclosure or use for personal benefit of official information by government officers] and for not more than one year in all other cases, or to both such fine and imprisonment.

STATEMENT

Three informations were filed against petitioners and Jack Lorsch in the United States District Court for the Southern District of New York (R. 10–31) charging violations of maximum price regulations established pursuant to the Emergency Price Control Act of 1942, in that they sold pork, other meat products, and poultry at prices in excess of the ceiling prices and failed to keep accurate records. The first information contained seven counts and named both petitioners and Lorsch as defendants (R. 10–16); the second contained 12 counts and named petitioner Arrow Packing Corporation and Lorsch (R. 17–26); and the third contained five counts naming the corporation and petitioner Newman (R. 27–31). The informations were consolidated for trial, and the jury found the corporation guilty on all counts of the three informations, and petitioner Newman guilty on all counts of the two informations in which he was named as a defendant (R. 4, 7, 9, 191).[1] The corporation

[1] During the trial Lorsch withdrew his plea of not guilty and pleaded guilty to all counts in both of the informations which named him as a defendant (R. 4, 7).

was sentenced to pay a fine of $5,000 on count 1 of each of the three informations, and $1 on each of the remaining counts, the $1 fines being remitted (R. 201, 204, 205). Newman was sentenced to five months' imprisonment and a fine of $2,500 on count 1 of the first information, a fine of $2,500 on count 2, and five months' imprisonment and a fine of $2,500 on count 1 of the third information, the imprisonment sentence under the first information to begin after service of the sentence under the third. Imposition of sentence on the remaining counts of the two informations was suspended, and he was placed on probation for two years to begin after service of the imprisonment sentences. (R. 202–203, 206–207.) On appeal to the Circuit Court of Appeals for the Second Circuit, petitioners' convictions were reversed as to the second count of the first information[2] and affirmed as to all other counts (R. 229).

Five retail butchers testified as to the sales at over ceiling prices, as charged in the various counts of the three informations, during the period from December 1944 to April 1945. Each testified that he was billed an amount which was proved to be the ceiling price and that he paid the amount billed, plus an extra charge which

[2] This count charged an illegal sale of cooked tongue (R. 11), but the evidence showed that no ceiling price had been established for this product (R. 168, 228–229).

was demanded by petitioners' codefendant Lorsch, cashier-bookkeeper at the corporation's place of business. The amount billed was paid by cash or check, but the overcharge was always paid in cash. (R. 36, 40, 44, 46, 50–51, 61, 67–69, 92, 93–94, 98–99, 100–102, 104–106, 111, 113–116, 118, 123, 132, 134–136, 142.) One witness asked for but was unable to obtain a receipt for the amount actually paid (R. 69, 73); and no witness ever received one for any more than the amount billed (R. 64, 68–69, 108, 119, 135).

These facts are not disputed. The other pertinent evidence relating to the issues raised by the petition is set forth in the Argument.

ARGUMENT

Petitioners do not deny that, as alleged in the counts as to which the judgments were affirmed on appeal, the retail butchers who testified for the Government were overcharged for meats purchased from the petitioner corporation. They claim, however, that there was no substantial evidence that they had knowledge of, directed, or authorized the overcharges made by their cashier and codefendant, Lorsch; and that consequently the case should not have been submitted to the jury (Pet. 2, 8, 9–13).

We think, however, that there was ample evidence to support the jury's finding, left undisturbed by the two courts below, that petitioner Newman, who was president of the petitioner

corporation[3] and obviously in charge at the corporation's place of business where the sales were made, was not only aware of and consented to the price violations, but in at least one instance took affirmative action to enforce payment of the overcharge, the benefit of which accrued to the corporate petitioner. In December 1944, when the ceiling price on turkeys was 44½ cents per pound (R. 163), Lorsch charged the witness Bayobeni 55 cents,[4] and the latter immediately complained to petitioner Newman, the "boss" at the Arrow Packing Corporation's place of business, that the price was too high. Newman, instead of disclaiming any responsibility or correcting the price, told Bayobeni, "If you don't want it you don't have to take it" (R. 71). Bayobeni asked, "Give me a break," and Newman replied, "I don't get a break myself. * * * So if you don't want it I am going to sell it to some other person" (R. 72). When the turkeys were delivered to Bayobeni's store, the truck driver insisted that Bayobeni's check be made out for no more than $44.50 (which represented the ceiling price for the 100 pounds of turkey) and that the balance of $10.50 be paid in cash; Bayobeni

[3] There can be no dispute that petitioner Newman was president of the petitioner corporation, as appears from petitioners' requested instruction No. 12 (R. 199), which the trial judge gave the jury (R. 185). The docket entries also show that the corporation's pleas of not guilty were entered "by George Newman, Pres." (R. 3, 6, 8).

[4] The charge was $55 for 100 pounds of turkey (R. 71–72).

was compelled to make payment in this manner in order to get the turkeys (R. 70, 72). When the check, which was made payable to the corporation (R. 79), was returned by the bank for insufficient funds, Newman went to Bayobeni's store to collect and threatened, "If you don't make that check good I am going to lock you up" (R. 73). Bayobeni again complained to Newman that "you charge me over the price" (R. 73), but Newman persisted, and finally obtained full payment of $44.50, the amount of the check, by instituting legal proceedings against Bayobeni (R. 73–74). Bayobeni wanted a receipt showing the amount paid for the turkeys, to prove to his partners that they had actually cost him $55, but Newman refused to give him one (R. 73). It was thus clearly shown that, at the very beginning of the period covered by the informations, Newman not only was aware of and consented to the overcharging, but personally forced payment of the full amount of the illegal charge by resorting to legal proceedings to obtain payment of Bayobeni's check made out to the corporation. Moreover, there was other evidence showing that Newman was in charge at the corporation's place of business and could not have been ignorant of what was going on. The corporation's cooler, where all the sales were made, was not very large, being only about 30 feet square—if ten people came in it became crowded—and "it had a little bit of an office on the side" (R. 147) where the custom-

ers paid their bills and overcharges to the cashier Lorsch (R. 46, 93–94, 98, 112, 113, 116, 118, 134). Some of the customers testified that when Newman was present (R. 103, 116, 136), he would greet customers at the door (R. 117, 137, 146–147) or stand outside of the cooler and talk and "kid" with the customers (R. 136, 144); and one testified that on one occasion in April 1945, when a shipment of meat was received, about 50 customers were kept waiting outside the cooler while Newman was inside "billing it all up for different purposes" (R. 137–140). Two of the five butchers who testified identified him as the "boss" at the Arrow Packing Corporation (R. 66, 71, 72, 73, 117); another said that he knew Newman was connected with the firm (R. 104, 117); and a fourth gathered that he was an officer of the corporation (R. 153). Bayobeni, moreover, was not the only customer who questioned the overcharge (R. 118), and although there was no evidence that anyone but Bayobeni made such complaint to Newman, it is hardly conceivable that he was ignorant of the black market flourishing in his presence in the small confines of the corporation's place of business. In view of Newman's presence and supervisory activity at the cooler and his insistence that Bayobeni pay the full price for the turkeys sold to him despite Bayobeni's protest against the overcharge, it cannot be said, as petitioners urge (Pet. 13), that "there was absolutely no clear or credible evidence" that the

overcharges were known to petitioners. There was, we submit, abundant proof that Newman was in charge at the corporation's place of business and that he knew of and participated in the illegal sales.

Finally, petitioners' rights were fully protected by the careful instructions given to the jury. After instructing them generally that "where the acts of the defendant may be given either an innocent or guilty construction, the jury is duty bound to give such acts the innocent construction rather than the guilty one" (R. 184), the court outlined the factors upon which the criminal liability of each of the petitioners depended.[5] It

[5] The full text of the instructions in this regard is as follows (R. 184–186):

"The Government introduced evidence that in certain sales of meat the defendant Lorsch collected cash from the customers in excess of what the Government claims was the ceiling price for the meats allegedly sold. The jury is instructed that unless the jury is satisfied beyond a reasonable doubt that the defendant, Arrow Packing Corporation, received the benefit of such cash and that the defendant Lorsch acted as the bookkeeper or agent of said corporate defendant, then the jury must find the defendant Arrow Packing Corporation not guilty.

"The Government introduced evidence that in certain sales of meat by the Arrow Packing Corporation, the defendant Lorsch, bookkeeper of the Arrow Packing Corporation, collected cash from the customers in excess of what the Government claims was the ceiling price for the meats allegedly sold. The jury is instructed that unless the jury is satisfied beyond a reasonable doubt, considering all the facts and circumstances of the whole case, that the defendant Newman participated in these sales or had personal knowledge of the cash collected by Lorsch

must be presumed that the jury followed these instructions, and, consequently, that its verdict was based upon findings that the corporation received

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in excess of the ceiling prices; then the jury must return a verdict of not guilty as to the defendant Newman.

"The jury is instructed that the fact alone that the defendant Newman was the president of the Arrow Packing Corporation does not make him liable criminally for the acts of the defendant Lorsch. Before the defendant Newman can be convicted, the jury must be satisfied beyond a reasonable doubt by clear and convincing evidence that Newman wilfully participated in the acceptance of prices in excess of over the ceiling in violation of the regulations involved.

"In connection with the charge that has just been read, the jury is instructed that an employer is criminally responsible for the criminal acts and conversations of an employee when those acts and conversations occur in the regular course of and within the scope of the employee's duties in the business and when they are done pursuant to instructions from the employer for the benefit of the business.

"Certain witnesses have testified to certain conversations with the defendant Lorsch not in the presence of the defendant Newman. The jury is instructed that such conversations are not binding upon the defendant Newman as such and in determining the guilt or innocence of the defendant Newman, the jury may not consider any statements made by the defendant Lorsch to any of the customers named in the various informations, unless from the facts and circumstances of the whole case you are satisfied that Newman was aware of these conversations and their general substance.

"The jury is instructed that they are not to presume that the defendant Lorsch in accepting cash in addition to the ceiling charges for the meats sold acted under the direction or with the knowledge or consent of the defendant Newman. However, you may find that to be the fact if the evidence satisfies you beyond a reasonable doubt."

the benefit of the overcharges; that Newman wilfully participated in the acceptance of the overcharges; that the overcharges occurred "in the regular course of and within the scope of" Lorsch's duties and were made "pursuant to instructions" from and "for the benefit of" the corporation; and that the jury did not merely presume Newman's knowledge or direction of, or consent to, the overcharges, but were satisfied from the evidence beyond a reasonable doubt as to his direct complicity.

Contrary to petitioners' contention (Pet. 10–11), the intent of an agent may be imputed to a corporation in a criminal case (*New York Central Railroad* v. *United States*, 212 U. S. 481), even where intent is a necessary element of the offense (*C. I. T. Corp.* v. *United States*, 150 F. 2d 85, 89–90 (C. C. A. 9); *Egan* v. *United States*, 137 F. 2d 369, 379 (C. C. A. 8), certiorari denied, 320 U. S. 788; *Minnisohn* v. *United States*, 101 F. 2d 477, 478 (C. C. A. 3); *Joplin Mercantile Co.* v. *United States*, 213 Fed. 926, 935–936 (C. C. A. 8), affirmed, 263 U. S. 531), and even where the agent is only a salesman acting within the scope of his employment (*Zito* v. *United States*, 64 F. 2d 772, 775 (C. C. A. 7)). The corporate petitioner was therefore responsible for the acts of its responsible agents and codefendants—Newman, "the boss," and Lorsch, the cashier-bookkeeper—even though there was no evidence that higher officers (if any) of the corporation were cognizant

of the offenses (*C. I. T. Corp.* v. *United States*, 150 F. 2d 85) for, as the *C. I. T. Corp.* decision points out, the rule applied in the federal courts is that stated by Justice Atkin in *Mousell Bros.* v. *London and Northwestern Railway Co.*, 2 K. B. (1917) 836, 846:

> When a penalty is imposed for the breach of a duty, it is reasonable to infer that the penalty is imposed for the default of a person by whom the duty would ordinarily be performed.

2. Petitioners assert (Pet. 14) that they were prejudiced by the trial court's refusal to give the following requested instruction (R. 196–197).

> To warrant a conviction on circumstantial evidence each fact necessary to the conclusions of guilt must be proved beyond a reasonable doubt, and all the facts so proved must be consistent with each other and with the main fact sought to be proved, and the circumstances, taken all together, must be of a conclusive nature and producing in effect a reasonable and moral certainty that the accused committed the offense charged. The mere union of a limited number of independent circumstances, each of an imperfect and inconclusive character, will not justify a conviction. They must be such as to create and justify full belief according to the standard rules of certainty. It is not sufficient that they coincide with and render probable the guilt of the accused. The facts so proved must

> be incompatible with innocence and incapable of explanation upon any other reasonable theory than that of guilt.

The court had instructed the jury that (R. 187–188):

> Circumstantial evidence is legal and acceptable evidence. It is that evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency to lead the mind to a conclusion that the fact exists which is sought to be established. The circumstantial evidence must be such as to exclude every reasonable hypothesis except the fact sought to be proven.
>
> * * * Circumstantial evidence may be relied upon by a jury to support or bring about a conviction, but, as I said before, in order that that may come about, the circumstantial evidence must point to guilt, that is, to the exclusion of any reasonable hypothesis of innocence.

Obviously, the court's instruction was adequate, and petitioners make no attempt to point out wherein it is deficient. If anything, the charge given is more to the point and less confusing than the rejected instruction, and "it was plainly unnecessary for the judge to grant the request" (R. 228).

3. Petitioners assert generally (Pet. 14) that the charge was inadequate because it contained no reference to the statute or the nature of the offenses. Petitioners, however, made no objection

to the charge in this respect, nor did they request any clarification (see R. 190). The court made it clear that petitioners were charged with wilfully making sales of meat products at prices in excess of the ceiling prices (see R. 184–186). Thus all elements of these offenses were covered. The offenses charged were not involved ones, and the simplicity of the court's language was, we think, appropriate.*

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

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MARCH 1946.

* Petitioners' contentions addressed to the counts charging failure to keep accurate records of the prices charged (Pet. 13–14) are inconsequential, since the $1 fines imposed on the corporate petitioner under these counts were remitted and, as to petitioner Newman, imposition of sentence was suspended not only on these counts but on seven other counts involving overcharges (see pp. 3–4, *supra*).

U. S. GOVERNMENT PRINTING OFFICE: 1946